

THE SUPREME COURT AND THE SECOND AMENDMENT: HOW PREVIOUS RULINGS  
WILL AFFECT MODERN ISSUES.

by

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### Abstract:

This thesis will examine the current and past Supreme Court interpretations of the Second Amendment. This thesis will use a variety of scholarly journals and other sources to back up claims with evidence. The thesis will be broken up into three sections with each part addressing important aspects of the Second Amendment. The first section examines past interpretations through Supreme Court opinions and sources that reference the Framers of the Constitution. The second section examines how that interpretation has changed because of interest groups and other organizations. The third section is dedicated to the modern Second Amendment issues that the Supreme Court have yet to address. All of these sections are important to understanding the rationale of the Supreme Court Second Amendment jurisprudence.

The Second Amendment and its history are extremely important to the political landscape of the United States of America. The Second Amendment was so important to the Framers of the Constitution that it was enshrined in the Bill of Rights. It is well-known that the “right to bear arms” was adopted in response to the tyranny of the British Crown and to prevent a future tyrannical government. However, these commonplace interpretations, while important to understanding the culture of the United States of America, do not necessarily convey the complexity of issues surrounding the Second Amendment. Upon further inspection of the text of the amendment, there are many facets to the modern political and constitutional issues that arise. For instance, “citing the second comma of the Second Amendment, the U.S. Circuit Court of Appeals for the District of Columbia ruled... that district residents may keep guns ready to shoot in their homes” (Van Alstyne, 2007, p. 471). A single comma, in this case, changed the entire interpretation of the Second Amendment. In cases of complex constitutional law that create real controversy and can have grave policy effects on the American population, the United States Supreme Court usually will take a consistent stance and rule on the merits. However, the United States Supreme Court has, so far, refused to take a consistent stance on its interpretation of the Second Amendment.

The Supreme Court, under its inherent power of judicial review, can review legislation or an executive order to see if either violates the Constitution. The Second Amendment, historically, has not been the subject of intense litigation. Only recently has the Second Amendment become a contentious issue in American politics. The Supreme Court, curiously, has declined the chance to create a consistent doctrine when dealing with a Second Amendment issue. Instead, the Court has avoided controversy or remanded the issue to lower courts to resolve. A lack of consistent ideology on gun rights put forth by the Supreme Court is a huge

issue due to the high level of gun ownership in the United States. In the United States of America, the percentage of the population that owns a gun "...is roughly 25 percent "(Joslyn, 2018, p.8). With such a high percentage of the population owning guns, there are many differing opinions on the legality of interfering with gun ownership. This can create friction or conflict between political parties and lead to extremist views. In fact, since the Supreme Court has not displayed a consistent ideology, several factions have incorporated gun rights into their views on freedom and individualism. For examples, "gun culture comprises a host of values aligned with conservative ideology and the Republican Party, including individualism, self-sufficiency and limited government" (Joslyn, 2018, p.10). On the other hand, gun culture has created a certain perception of threat among rival political factions. Among Democrats and liberals in the United States, members overwhelmingly view gun rights in a negative light and to a certain extent, they feel threatened (Joslyn, 2018). This increasing ideological divide over the Second Amendment not only has an effect on the relationship between opposing political parties, it also creates problems when those same political parties try to enact public policy on guns.

Public policy over the Second Amendment and gun rights has stalled in the legislative branch. Unfortunately, this inaction could not come at a worse time. Guns are becoming increasingly more complex, creating new issues transcending simple ownership of guns, among them the ability to modify a pre-owned semi-automatic into a fully automatic gun. Such things are possible through modifications that can transform semi-automatic fire to fully automatic fire, like bump stocks (Gilbert, 2018). Bump stocks, while considered a gun modification, are not a traditional part of gun ownership. The Supreme Court and Congress have declined to take up these issues. This thesis will attempt to explain these and other issues by taking an in-depth look at the history, interpretation, and modern problems with the Second Amendment.

The first section of this thesis is dedicated to the meaning and history behind the Second Amendment. This includes a closer examination the text of the Second Amendment and how the Framers of the Constitution viewed the concept of the Second Amendment. This section will focus on the language of the Second Amendment that supports the collective right to bear arms interpretation and the language that supports a personal right to bear arms. This will also include an examination of past Supreme Court decisions that have taken both of these interpretations into account. This section will also use statistical evidence of gun ownership to emphasize the extent of the issues surrounding the Second Amendment.

The second section of this thesis will focus more on the militia versus personal firearm argument. However, this section differs from the first because it will examine how the Second Amendment has been interpreted in historical terms. In other words, this section will examine the history of firearms in America. This section will be more like a timeline and evolution of Supreme Court views on the Second Amendment. This evolution will logically lead to the third section, which describes the current issues surrounding the Second Amendment in detail and hopes to predict or analyze how the Second Amendment will apply to each of the separate issues and explain how the Supreme Court might rule upon them. These issues are important and need to be explored to allow for a greater understanding of the Framers and what it truly means to have a right to bear arms.

The right to bear arms has its roots in the founding of the United States of America. The Founding Fathers found the right important enough to add to the Bill of Rights as a protection against federal overreach. However, there is a question of interpretation. Did the Framers intend a collective right to bear arms, such as state militias? Or did they intend a personal right for the

individual to own arms for their own protection? To find out, the actual text of the Second Amendment must be examined and analyzed.

The collective right to defense or organizing a militia was generally recognized during the Revolutionary War. However, the concept of a state militia can trace its origins back to England. In England, “early militias in large part were citizen-led, citizen-organized, and citizen-funded” (Golden, 2013, p. 1025). This carried over to the colonies. In the colonies, militia duty was mandatory at first. (Golden, 2013). However, it gradually evolved into a volunteer service in several states. All volunteers were expected to own a gun. However, if the volunteers were too poor to own a gun, then the colonies would provide guns from their armories. In fact, all of the colonies kept public arms to give to poor colonists (Golden, 2013) . After several state militias fought for independence, the Framers of the Constitution wanted to keep the right of the states to have a militia. In fact, James Madison and the House Committee on Amendments, which helped pass proposed amendments to the Bill of Rights, moved the text of the Second Amendment. The first sentence of the Second Amendment, “[a] well-regulated Militia, being necessary to the security of a free State.” (Carlson, 2002, p.76), was moved to the beginning of the proposed amendment from the end. This was important because the Framers intended to make this sentence a “justificatory clause” (Carlson, 2002, p. 76). In other words, it justified the existence of the Second Amendment itself. Furthermore, the Framers most likely wanted to keep the right of state militia members, as a collective group, to determine for themselves whether a government directive was tyrannical or not (Golden, 2013).

A collective right to own firearms is important to understand from the viewpoint of the Framers. A collective defense was needed to keep the new country safe. However, each state saw itself as independent from other states. The state militias were kept both to allow for a collective

defense of the nation and to fight against federal government tyranny. The state militias had to, therefore, find a balance between being under the purview of the federal government or independent (Golden, 2013). However, the Second Amendment applies to individuals, not states. The Second Amendment most likely imbued an individual with the power to own arms, but not for mere personal defense. Instead, the Second Amendment protected an individual right to own firearms, but only for military or militia purposes (Carlson, 2002). The right to bear arms was for collective defense, but not much of a collective right. For instance, the Militia Act of 1792 required individual militia members to own firearms for the sake of state defense (Golden, 2013), but did not require state militias to provide guns to members. The Militia Act of 1792 also allowed some measure of federal control over state militias, making the Second Amendment, in the eyes of militia members, even more important.

Though the Militia Act of 1792 was enacted, the Framers still believed in a less central method of protection. James Madison believed that the Second Amendment's purpose was to aid in "buttressing community security" (Uviller, 2002, p. 40). Madison believed that a despotic and corrupt government could utilize the armed forces to their advantage. Other Framers, mostly former Anti-Federalists, feared the amount of power both Congress and the President had over the armed forces. They also believed a less centralized force would be a better check against tyranny.

The Framers' belief in militia is very clear throughout the ratification of the Constitution. In fact, the right to collective defense is found in several places of the Constitution, not just the Second Amendment. However, the Second Amendment is the most prominent and important part of guaranteeing an individual right to participate in a collective defense. The Framers also provided enough power of the states so that they would always have the ability to form militias

(Carlson, 2002). This right of the states and the individuals to have militias was the dominant thinking behind the Second Amendment for two centuries. However, another interpretation of the Second Amendment that does not touch on militias or collective rights soon developed.

The Second Amendment, while having a militia clause, could also be construed to mean a right to bear arms as an individual. This was seen as a natural right. This natural right to own personal arms has its roots in English tradition. In English tradition, owning a gun was a duty and a right. For many citizens of England and the American colonies, firearms were just a normal part of life (Carlson, 2002). For the American colonies, settling west of the Appalachians was dangerous. When settlers intending to settle on a parcel of land, a gun was tool for survival in the harsh wilderness (Carlson, 2002). A gun was seen as a tool for multiple uses, not just for self-defense. Hunting and sport were also considered appropriate uses. Militia service fell under that umbrella as well.

After the American War for Independence, the gun took on a new significance. Rebellion against tyranny became one of its many uses. The Framers enshrined this sentiment in the Second Amendment. Through the exact language of the Second Amendment, the Framers were “guaranteeing the right rather than conferring it” (Carlson, 2002, p.102). The Senate even considered adding on to the Second Amendment with a phrase about common defense. However, the Senate ultimately decided against adding the phrase. This would seem to indicate that the Senate was not interested in “using the militia clause to limit the guarantee clause” (Carlson, 2002, p. 102). An unrestricted right to firearms could be inferred from this reading of the Constitution. However, when looking at the Second Amendment’s meaning and language in the context of other amendments in the Bill of Rights, it gets more complicated.



The unrestricted right to bear arms for personal defense means much more than owning a gun and keeping it in your house. It could also mean having a individual right to have a firearms outside of your home (Halbrook, 2020). Unfortunately, the Framers were silent on this part of the Second Amendment. The Framers' intent, however, can be inferred from other amendments in the Bill of Rights. When referring to a right that deals with issues inside of the home, the Framers state it. For example, the word "houses" specifically appears in the text of the Search Clause of the Fourth Amendment (Halbrook, 2020). This is important because the Fourth Amendment specifically bars illegal searches of a dwelling. The words "houses" or "homes" are nowhere to be found in the language of the Second Amendment. Another example is the Third Amendment. The text of the Third Amendment states, soldiers will not be "quartered in any house" (Halbrook, 2020, p.331). These examples would seem to suggest that the Framers did not specifically bar gun ownership within the home. However, it also means the Framers did not specifically endorse a right to own a gun in the home.

The exact language of the Second Amendment includes the word "bear", instead of "houses" and "homes". The word "bear" would not be in the amendment if it did not specifically refer to having the right to have the gun outside of your home (Halbrook, 2020). However, this does not mean the right is unrestricted nor unlimited. In fact, the belief that a gun was solely for an unrestricted right to personal and self-defense is a recent interpretation of the Second Amendment (Collins, 2014) in American political discourse. A firearm was considered a tool with multiple purposes, even if was dangerous. The National Rifle Association has become the leading voice in the area of individual right to bear arms for the purpose of self-defense. However, the National Rifle Association was not always like this. The National Rifle Association, or NRA for short, was founded after the Civil War in 1871. It was founded by

Colonel William C. Church and Captain George W. Wingate as an organization that informs on firearm safety and firearm sports (Smith, 2016). The National Rifle Association actually supported some firearm restrictions in the 1930s and 1940s (Smith, 2016). However, this began to change in the 1970s, when the movement for an individual rights approach began to enter mainstream political thought. The National Rifle Association grew exponentially, especially following the 1970s. In the 1930s, the National Rifle's Association's numbers were a few thousand. Today, that number is up to four million. (Smith, 2016). The National Rifle Association, which started as a gun safety and sports organization, began to see the firearms more as tools to protect one's self and their family (Collins, 2014). Instead of a multi-purpose tool, guns became a symbol of individualism and individual rights. The NRA, soon after restructuring its ideology about firearms, began to advance an idea about an individual right to self-defense (Collins, 2014).

Both of these interpretations of the Second Amendment have evidence in the intent of the Framers and the Constitution. A militia was important to the early states and so was having a personal right to a gun. However, there has been significant disagreement on Second Amendment cases that make their way to the Supreme Court. The inconsistent ideology and precedent on these Second Amendment cases has made this issue especially contentious politically. These past cases drew upon both the originalist viewpoint and the living document viewpoint that Justices sometimes use to guide their decision-making. However, like the interpretations of the Second Amendment, legal decisions were complicated and murky. These past decisions generally focused on the personal right to own a gun or an individual right to join a militia.

The Second Amendment, for as contentious and politically fraught as it is, has not been litigated that much over the two hundred fifty-year history of the United States. However, there are truly landmark cases that deal with the Second Amendment directly. The first of these landmark cases is *United States v. Cruikshank*. This case, decided in 1873, dealt with the aftermath of politically motivated violence in the Colfax Massacre. The Colfax Massacre started when an 1872 Louisiana gubernatorial race was in dispute and hotly contested, along with several other state and local positions. This resulted in political violence by the Ku Klux Klan, in which hundreds of African-Americans were murdered. Several of the members of the Ku Klux Klan were arrested and charged with “conspiring together to injure, oppress, threaten, and intimidate” (*United States v. Cruikshank*, 1873) African-American residents. The defendants were charged more specifically with conspiring to violate the First Amendment and Second Amendment rights of the African-American citizens of Louisiana. They were charged under the Enforcement Act of 1870, a federal act that made this kind of conspiracy a crime. This became the first Second Amendment case the Supreme Court ever took up.

The Court’s opinion, authored by Justice Waite, determined whether the First and Second Amendments were incorporated by the Fourteenth Amendment and applied to the states. Justice Waite wrote that citizens of the United States “are subject to two governments: one State, and the other National” (*United States v. Cruikshank*, 1873). These two governments are distinct and have separate powers that do not overlap, according to Justice Waite. Incorporation, the idea that the Bill of Rights applies to the states and the federal government through the Fourteenth Amendment, was a central issue in this case. Justice Waite believed incorporation was not the intent of the Fourteenth Amendment. Justice Waite and the majority of the Court believed that the federal government “is one of delegated powers alone” (*United States v. Cruikshank*, 1873).

The federal government did not have vast power over the states. Instead, the federal government's "authority is defined and limited by the Constitution" (*United States v. Cruikshank*, 1873). This interpretation applied to the Bill of Rights especially.

Regarding the Second Amendment, Justice Waite and the majority thought it was not the purview of the federal government to regulate gun laws or even charge the Ku Klux Klan members. According to the Court, the Second Amendment only protects the right to bear arms from being "infringed by Congress" (*United States v. Cruikshank*, 1873). In other words, the Bill of Rights and the Second Amendment only "restrict the powers of the national government" (*United States v. Cruikshank*, 1873). Ultimately, the Court decided against the African-American residents and they overturned the conviction of the Ku Klux Klan members. However, this ruling did not explicitly state that there is an unrestricted right to bear arms. Instead, the ruling, by deciding against incorporation, necessarily implied that the Second Amendment could be limited through state and local laws (Lieber, 2005). However, the Supreme Court did not rely on the more modern interpretations of the Second Amendment. The arguments in the case were purely about incorporation and the Bill of Rights. The decision still left open the possibility of state regulation of the Second Amendment.

The ruling in *United States v. Cruikshank* did not stop the federal government from eventually enacting a national gun control law. The National Firearms Act of 1934 was an important law that banned some gun modifications, such as a sawed-off shotgun. Eventually, two individuals were arrested and convicted for possessing sawed-off shotguns. They appealed their case and the Supreme Court took the case. The case, *United States v. Miller*, was the first time the Supreme Court tried to define exactly what the Second Amendment meant (Lieber, 2005).

Unlike *United States v. Cruikshank*, this case attempted to carve out a consistent doctrine for Second Amendment litigation.

The majority opinion, written by Justice McReynolds, took up the issue of whether the National Firearms Act of 1934 violated the Second Amendment. The Court also tried to determine if an individual right to bear arms existed. The two defendants charged argued that the National Firearms Act of 1934 did not deal with revenue and took away “police power reserved to the States” (*United States v. Miller*, 1939). However, Justice McReynolds and the majority disagreed with this interpretation. Instead, the existence of a sawed-off shotgun did not have “some reasonable relationship” (*United States v. Miller*, 1939) to keeping a well-armed militia. Justice McReynolds and the majority also felt that the sawed-off shot gun was not “ordinary military equipment” (*United States v. Miller*, 1939) needed to provide for the common defense. Instead, Justice McReynolds and the majority did not see the right to bear arms as extensive and broad. The Court simply did not believe the Second Amendment “guarantees the right to keep and bear such an instrument” (*United States v. Miller*, 1939). McReynolds and the majority stressed the history of militias in the United States and how the Second Amendment applied.

In the aftermath of *United States v. Miller*, many proponents of a collective right to own guns felt vindicated. The proponents of a collective right also believed the Second Amendment only prohibited federal laws (Lieber, 2005) when they affected the right to keep and form a state militia. However, proponents of the individual right to own firearms interpreted the ruling to only apply to sawed-off shotguns specifically. Furthermore, proponents of an individual right approach point to the sections of the opinion that reference who is eligible for a militia. The proponents of the individual rights reference the *United States v. Miller* list of eligibility for militia service because they believed the Supreme Court decided the Second Amendment applied

to all citizens capable of serving in the military (Lieber, 2005). Since all individuals were capable of militia service, proponents of an individual rights theory believed this conferred a universal, restricted right to bear arms as an individual. This would undeniably lead to the conclusion that federal gun regulation, such as the National Firearms Act of 1934, is unconstitutional if the gun has “usage in a military context” (Lieber, 2005). This interpretation would allow for the private possession of military-grade weapons. The Supreme Court did not endorse this view. The precedent in *United States v. Miller* would stand for seventy years before it had a challenge.

Just a year before the famous case, *District of Columbia v. Heller*, the District of Columbia Circuit Court of Appeals decided an issue on gun control. In *Parker v. District of Columbia*, two parts of the District of Columbia’s gun control law were struck down. The appellate judges believed that the Second Amendment “protects an individual right to keep and bear arms” (*Parker v. Columbia*, 2007). When it was determined by the District of Columbia Circuit Court that the “arms” wording in the Second Amendment referred to firearms, it ruled that “it is not open to the District to ban them” (*Parker v. District of Columbia*, 2007). This was the first federal appeals court to overrule a federal gun control law. This case was also the precursor to *District of Columbia v. Heller*. However, it makes several key findings that are different from the ruling in *District of Columbia v. Heller*. First, *Parker v. District of Columbia* does not necessarily agree that the prefatory clause is just an introduction. While the decision does acknowledge and accept the individual rights interpretation, it does so in the context of a state militia. *Parker v. District of Columbia* accepts that the Framers intended for there to be militias, even if the Second Amendment is individual in nature. The judges concluded that the militia clause did, in fact, create a “salutary civic purpose of helping to preserve the citizen

militia” (*Parker v. District of Columbia*, 2007). It also acknowledges that the militia clause has been the historical precedent for the Second Amendment. However, the circuit court felt that the militia clause was neither restrictive nor exclusive. Instead, the circuit court stated that, against precedent, the Second Amendment’s rights were not “contingent upon his or her continued or intermittent enrollment in the militia” (*Parker v. District of Columbia*, 2007). This was the first step to chipping away the theory of a collective right for firearms. However, the case is important because it acknowledges the historical value of the Second Amendment’s previous interpretations.

The biggest landmark case in Supreme Court history came in 2008. *District of Columbia v. Heller* is the quintessential case on the Second Amendment and what it means to bear arms. Under District of Columbia law, it was illegal to own an unregistered gun and to register handguns. Furthermore, District of Columbia law required firearms in the “home be kept nonfunctional” (*District of Columbia v. Heller*, 2008). In other words, it was a blanket ban on handguns within the District of Columbia. Dick Anthony Heller was a police officer trying to register his handgun with the government. However, the District of Columbia refused to register his gun and Heller sued. Heller believed that the blanket ban on handguns and prohibition on registration violated his Second Amendment rights as an individual. The Supreme Court granted certiorari and heard Heller’s case on its merits.

Justice Scalia wrote the opinion for the majority. This is important because Justice Scalia applied his ideology of textualism and originalism when writing the opinion on the Second Amendment. For Justice Scalia and the majority, the Second Amendment is broken up into “its prefatory clause and its operative clause” (*District of Columbia v. Heller*, 2008). These two clauses interact in a specific way, according to Justice Scalia. The prefatory clause, also known

as the militia clause, only introduces the rest of the text of the amendment. By this metric, the prefatory clause does “not limit or expand the scope of the operative clause” (*District of Columbia v. Heller*, 2008). The operative clause, on the other hand, is intended to have an actual effect on conferring a right. Justice Scalia and the majority focus first on this operative clause of the Second Amendment. The operative clause focuses on the right of the people to keep and bear arms. Justice Scalia, while analyzing the operative clause of the Second Amendment, references other sections of the Constitution. Justice Scalia argues that other sections of the Constitution that use the term “the right of the people” does, in fact, “refer to individual rights” (*District of Columbia v. Heller*, 2008). The First Amendment, the Fourth Amendment, and the Ninth Amendment are further evidence of the individual rights approach. All of these amendments contain the operative clause and confer the rights to individuals, especially through the Ninth Amendment. Interpreting the Second Amendment’s operative clause further, Justice Scalia notes that ““bear” meant to “carry”” (*District of Columbia v. Heller*, 2008), even at the time of ratification. Furthermore, Justice Scalia argues that the dissent’s relevant documents exclude gun sports and hunting. For the majority, the Second Amendment and right to bear arms “is not limited to military use” (*District of Columbia v. Heller*, 2008). The prefatory clause, on the other hand, is misunderstood, according to Justice Scalia. Justice Scalia argued that Congress does not have the authority to create a militia, hence there is no collective right. In fact, the standing militia of the states are assumed “by Article I already to be *in existence*” (*District of Columbia v. Heller*, 2008). In other words, Congress only has the right to organize the militia into units. It is emphasized, again, that the prefatory clause only introduces the operative clause.

Justice Scalia, while focusing mostly on the wording of the Second Amendment, also recites evidence of an individualist approach from several state constitutions. The constitutions



of Vermont and Pennsylvania say there is a right for their citizens to bear arms “for the defense of themselves and the state” (*District of Columbia v. Heller*, 2008). This evidence is corroborated by other state constitutions that protect a right to bear arms without the requirement of militia service. In the North Carolina constitution, “the people have a right to bear arms” (*District of Columbia*, 2008) for defense of the state. This is a little more ambiguous, but Justice Scalia points out the North Carolina Supreme Court has interpreted this to be an individual right unconnected to service in a militia. The last state constitution referenced is that of Massachusetts. Massachusetts, like North Carolina, allows for the individual right to bear arms for the common defense. However, the Massachusetts Supreme Court has interpreted common defense to include self-defense. Ultimately, the majority decided the Second Amendment guaranteed an individual right to bear and keep arms “in case of confrontation” (*District of Columbia v. Heller*, 2008). The District of Columbia law banned “an entire class of “arms”” (*District of Columbia v. Heller*, 2008) and, therefore, was unconstitutional.

The dissent in *District of Columbia v. Heller* relied on previous precedent, such as *United States v. Miller*. The dissent is important in this case because it enshrined the militia view in modern terms and gives an avenue to challenge the majority in a future case. Justice Stevens wrote one of the dissenting opinions. In his opinion, Justice Stevens argues that the Framers obviously wanted guns for a military situation, but this case does not raise that question. Justice Stevens argues that the central question in *District of Columbia v. Heller* is whether gun ownership “for nonmilitary purposes” (*District of Columbia v. Heller*, 2008) can be restricted. Justice Stevens relies on the precedent of *United States v. Miller* to argue the Second Amendment does not limit the power of the legislature to “regulate the nonmilitary use and ownership of weapons” (*District of Columbia v. Heller*, 2008). Justice Stevens believes the

Court's ruling is ahistorical because it disregards a hundred years of precedent. The majority overturns what "hundreds of judges" (*District of Columbia v. Heller*, 2008) have used as precedent since *United States v. Miller*. Justice Stevens acknowledges there was a fear of a federal standing army that could be used against the states. Furthermore, the Second Amendment only protects the right to bear arms "in conjunction with service in a well-regulated militia" (*District of Columbia v. Heller*, 2008). There is nothing in the Framers' documents or in the Constitution that points to an individual right to bear arms purely for self-defense, according to Justice Stevens.

Justice Breyer agrees with Justice Stevens's militia view, but also posits another reason the majority was wrong. The second reason is the constitutional protections the Second Amendment afford are limited, just like any other right (*District of Columbia v. Heller*, 2008). Justice Breyer, like Stevens, uses a historical example. Big cities in colonial America "restricted the firing of guns within city limits" (*District of Columbia v. Heller*, 2008), according to Justice Breyer. Big colonial cities, such as New York and Philadelphia, also regulated "the storage of gunpowder" (*District of Columbia v. Heller*, 2008). Justice Breyer argues that the same type of regulation could be done by the states today. Justice Breyer, in his dissent, comes up with a balancing test. Under this "interest-balancing inquiry" (*District of Columbia v. Heller*, 2008), there are important constitutional concerns on both sides of the balancing test. According to Justice Breyer, the Court cannot simply determine gun regulation to be constitutional or unconstitutional. The Court has to determine if the "statute burdens a protected interest" (*District of Columbia v. Heller*, 2008) proportional to the statute's effects on other important government interests. Justice Breyer concludes that the Courts should defer to the will of the legislatures on this issue. The legislatures generally "have greater expertise" (*District of Columbia v. Heller*,

2008) when it comes to the interest-based proportionality test. However, the ruling precedent became the individual rights theory that the majority adopted.

The last and most recent case on the Second Amendment is *McDonald v. City of Chicago*. In the aftermath of *District of Columbia v. Heller*, other handgun bans across the country came under scrutiny. Several of these lawsuits were filed against the city of Chicago because of its restrictive handgun law. The plaintiffs in the case argued that the handgun ban left them “vulnerable to criminals” (*McDonald v. City of Chicago*, 2010) and violated their Second Amendment right. Furthermore, they claim the Second Amendment should be incorporated to the states through the Fourteenth Amendment’s Due Process Clause. The Seventh Circuit Court of Appeals disagreed and upheld the handgun ban. The Supreme Court considered the issue on appeal.

Justice Alito wrote the majority opinion of the Court. Justice Alito first addressed the handgun ban itself. He pointed out that the ban was adopted by Chicago to stop the spread of firearm-related violence. However, the homicide rate skyrocketed in the time since the ban was enacted (*McDonald v. City of Chicago*, 2010). Justice Alito acknowledged that, in *District of Columbia v. Heller*, the Court left open the question of incorporation for the Second Amendment. Justice Alito argued that the Fourteenth Amendment “fundamentally altered our country’s federal system” (*McDonald v. City of Chicago*, 2010) and changed the meaning of the Bill of Rights. The plaintiffs wanted to incorporate the Second Amendment, first, through the Privileges and Immunities Clause of the Fourteenth Amendment. However, Justice Alito disagreed with this reasoning. Justice Alito and the majority argued that the Due Process Clause, not the Privileges and Immunities Clause, incorporates the Bill of Rights to the states. Justice Alito and the majority concluded that the Due Process Clause incorporates the Second

Amendment and applies to the states. According to Justice Alito, “[s]elf-defense is a basic right” (*McDonald v. City of Chicago*, 2010) that has been recognized throughout history. The Second Amendment enshrines this right in the Constitution. The Second Amendment is so fundamental to liberty and so “deeply rooted in this nation's history and tradition” (*McDonald v. City of Chicago*, 2010) that it must be protected, according to Justice Alito. Justice Alito and the majority decided that the Second Amendment applied to the states through the Due Process Clause. Furthermore, they found a Second Amendment right to self-defense is essential to the “nation's scheme of ordered liberty” (*McDonald v. City of Chicago*, 2010). The dissent argued that the right to a firearm was not fundamental or essential to liberty. They felt, again that the majority opinion was history “out of context and anachronistically applied” (Poznansky, 2011, p.3). Ultimately, the Court upheld the essential and fundamental right, espoused in *District of Columbia v. Heller*, and applied it broadly to the states.

Since the decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the individual right theory has prevailed in the debate over the Second Amendment. Firearms have always been prevalent in the United States. About a third of all Americans own some type of firearm (Joslyn, 2018). However, there was a slight uptick in firearm sales and possession after the decisions. Furthermore, perception over gun rights has been even more politically divisive since then. Advocacy and interest groups have played a part in this divide. The National Rifle Association allocates “\$2,980,000 to lobbying efforts” (Smith, 2016, p.1063) every year. On the other hand, the Brady Campaign, a gun control interest group, has been consistently “spending \$40,000 [in] lobbying” (Smith, 2016, p.1063) since 2012. This has partially fueled animosity between individual rights and collective right proponents. The individual rights proponents have consistently been present since *District of Columbia v. Heller* and *McDonald v.*

*City of Chicago*. According to public opinion polls, “less than 39% of respondents” (Smith, 2002, p.158) support a total handgun ban. This statistic might have played a role in the two decisions by the Supreme Court. However, after these cases, the two major political parties deviated wildly from each other. Before *District of Columbia v. Heller* and *McDonald v. City of Chicago*, most Americans citizens supported at least some gun control, including background checks. Before 2008, the National Gun Policy Survey found that 81% of those surveyed supported some type of background check for firearms (Smith, 2002). However, after 2010, the Republican Party dropped its support for safety and background checks from its platform because they feared it would create a gun registry (Charles, 2015). This, in turn, led to a stronger opposition to any gun control measure.

Another reason the individual rights theory has been so prevalent is because of the perception of rising crime rates. Areas with higher-than-average robbery rates were slightly more open to having gun permits (Kleck, 1996). There has been a rising perception in the United States of rising crime rates. While not necessarily grounded in fact, the perception maintains a strong grip on citizens unaccustomed to the American criminal justice system. However, this not as black and white as it seems. For instance, most people do support limited gun control; however, individual rights proponents only support it when it comes to criminals. National Gun Policy Surveys found that about three-fourths of the population believe that guns should be kept out of the hands of criminals (Smith, 2002). However, contrary to popular belief, most residents of cities support some form of gun control. Another study found that citizens of cities with a higher than average homicide rate did not see increased support for gun permits (Kleck, 1996). Furthermore, a higher police presence also deterred gun permits. The belief in self-defense is strong and many individual rights proponents point to rising crime rates to support this belief.

The next section will be dedicated to examining how these two interpretations grew historically. This will be a more in-depth discussion than just looking at the Framers and their intentions. Specifically, this section examines the history of the National Rifle Association and the Brady Campaign. It will examine how the NRA has changed over time. Finally, this section examines how the United States went from regarding the right to bear arms as being related to collective defense to regarding the right as relating an individual right to bear arms.

The militia and collective rights approach have been the cornerstone of the Second Amendment since 1791. That changed in 2008. Historically, the Second Amendment referred to a broader right under common law, upon which American jurisprudence is based. (Lund, 2008,). Though rulings on the Second Amendment are scarce, courts since the McReynold's Supreme Court have consistently ruled that the Second Amendment is for the purpose of a well-regulated militia. However, the District of Columbia Circuit Court overruled this precedent before *District of Columbia v. Heller*. The Supreme Court would later affirm this ruling. However, both of the courts failed to look at the comma that separates the two clauses, according to collective rights proponents. The individual rights proponents ignored the historical significance of the comma for the Framers (Van Alstyne, 2007) and refer to the commas in today's terms. The Framers felt differently about the commas and many historical courts have upheld this reading of the Second Amendment. The comma denotes an absolute clause that makes the operative clause the logical result of the prefatory clause (Van Alstyne, 2007). In other words, the right to bear arms is the result of having a well-regulated militia. While this comma is important, the Second Amendment actually has three, separate commas. Historically, the courts have examined all parts of the amendment; however, recent decisions require an interpretation that overlooks the last comma (Van Alstyne, 2007). This is unfortunate because the individual rights proponents justify their

views by using the originalist and textualist judicial views. The Brady Campaign stands by this historical interpretation of militias and gun control.

The Brady Campaign, much like the National Rifle Association, is an interest group dealing with gun rights. Unlike the National Rifle Association, the Brady Campaign focuses exclusively on gun control legislation that conforms with the militia clause and historical interpretation. The Brady Campaign is also much smaller, with only 600,000 members and has much less influence (Smith, 2016). The history of the Brady Campaign is also different from that of the National Rifle Association. The Brady Campaign started off as another gun control group called the National Council to Control Handguns and was founded in 1974. However, in 1980, the National Council to Control Handguns shortened its name to just Handgun Control Incorporated (Smith, 2016). After 1980, things began to change for the young organization. James Brady, a press secretary for President Ronald Reagan, was injured by an assassination attempt on the President in 1981 (Smith, 2016). This sparked huge backlash among the organization and it soon lobbied more intensely for gun control regulation that was consistent with the Second Amendment. This began a seven-year long push for the Brady Bill to pass Congress and become law (Smith, 2016). The Brady Bill, which will be discussed more in-depth later, was a national gun control law that increased regulations, such as federal background checks for firearms purchases and a mandatory five-day waiting period. This law completely changed the scope of federal involvement in regulating the Second Amendment and likely led to the decision in *District of Columbia v. Heller*.

The Brady Campaign has continued to thrive in a post-*Heller* world. However, the individual rights interpretation has taken center stage in the debate over the Second Amendment. Furthermore, the Supreme Court might be inclined to dismiss cases that deal with Second

Amendment issues because they would be deemed moot by the Court. For now, the individual rights interpretation stands as the law of the land. However, the Brady Campaign has consistently tried to get states to adopt gun control laws. Under *District of Columbia v. Heller*, states can regulate gun control within reason. This approach seems to have worked in some states, but not in others. These mixed results certainly stem from the decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. The Brady Campaign and other collective right proponents argue that the militia clause should prevail because Justice Scalia, in *District of Columbia v. Heller*, made several historical and logical mistakes (Lund, 2008). They argue that the Second Amendment, historically, applied to individuals for the purpose of a militia. Furthermore, the Brady Campaign and other collective right activists agree with Justice Breyer's cost-benefit analysis of the Second Amendment and believe that it has historical context within the founding of the nation (Lund, 2008). However, the individual rights interpretation has been the prevailing and dominant belief since *District of Columbia v. Heller*.

The individual rights interpretation has its roots in some parts of history, but fails to be present in other cases. The history of the Second Amendment prior to the twentieth century is sparse. The reason the Second Amendment was hardly challenged before the 1900s was because there were relatively few laws restricting gun rights (Carlson, 2002). The only types of firearms that were restricted before the twentieth century were guns owned by former slaves. This began to change in the twentieth century. The Prohibition Era was defined by organized crime and mobsters. It was a violent time in America and many mobsters used machine guns, sawed-off shotguns, and handguns to bully businesses or protect their stock of illegal alcohol. This led to the National Firearms Act of 1939, the subject of *United States v. Miller*. This act was later replaced by the Gun Control Act of 1968. This act banned high-power weapons, like bombs and grenades.



It also required licensing of gun dealers and created laws against using firearms in the commission of felonies. However, the 1980s marked a turning point for the belief in an individual right to own a firearm. Several laws were passed to alleviate some restrictions on firearms. The most prominent of these laws was the Firearm Owners' Protection Act of 1986. This law eased many restrictions on the sale of firearms and gun ownership (Carlson, 2002). However, the 1990s saw the biggest restriction on firearms since the National Firearms Act of 1934. The Brady Bill instituted the five-day waiting period and mandated licensure requirements. Furthermore, it required extensive background checks. This law was the beginning of the controversy surrounding the Second Amendment. Many individual rights proponents thought the law went too far; however, there was barely any litigation of the law. The National Rifle Association would become prominent due to its opposition to the Brady Bill.

Since *District of Columbia v. Heller*, the National Rifle Association grew monumentally in its power. However, *District of Columbia v. Heller* left some questions open to interpretation that could prove detrimental to the individual rights proponents and the power of the National Rifle Association. First, areas that concerned the commercial sale of firearms were not adequately addressed in specific detail (Vernick, Rutlow, Webster & Terret, 2011). This is important because Congress has power over commerce that crosses state lines. This is inconsistent with the view Justice Scalia took when deciding *District of Columbia v. Heller*. Second, Justice Scalia acknowledged that the individual right is not absolute; however, he did not give a specific criterion for evaluating gun laws (Vernick et. al, 2011). This is a problem because the Second Amendment, especially in the present, is treated as an absolute right when that is not the case. The third and last question left open by Justice Scalia is whether the Second Amendment applies to both state and local laws. This was answered directly in *McDonald v. City*

of *Chicago* (Vernick et. al, 2011). However, *McDonald v. City of Chicago* left even bigger questions unanswered.

*McDonald v. City of Chicago* was the latest case to be decided by the Supreme Court and is the ruling precedent. This rule enshrines the belief of individual right to bear arms for self-defense into law. However, it left big questions open that could shake the foundation of the individual rights interpretation. Justice Alito struck down the argument that the Second Amendment should be treated differently since it is dealing with a dangerous object and could affect public health (Vernick et. al, 2011). Admittedly, the amendments in the Bill of Rights should all be treated with equal reverence. However, the argument that the increasing firearm deaths causes a public health emergency is an intriguing argument. There is certainly a valid argument considering firearm deaths are increasing nationwide. Firearms accounted for “more than 240000 deaths from 2000 to 2007” (Vernick et. al, 2011, p. 2021) with the numbers increasing every year since. This level of death could be considered public safety and health. However, the Supreme Court thought otherwise. A second question the Supreme Court left open was a continuing one from *District of Columbia v. Heller*. There was no standard to determine which gun laws should be upheld and which should be struck down. This is a problem because of the extreme inconsistencies that came after this decision. On one hand, a total handgun or rifle ban is unconstitutional but, on the other hand, a law against felons owning a firearm is constitutional, which would go against this interpretation because it is a form of total handgun ban (Vernick et. al, 2011). There needs to be a balancing test, but the Supreme Court did not put one forward.

After *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the unrestrained individual rights interpretation dominated mainstream political thought. The prominent and

historical interpretation that lower courts relied on for over a century was tossed to the side. From the 1940s to the late 2000s, the lower courts relied on the precedent and rejected the view that the Second Amendment affords the right to own a firearm for a nonmilitary purpose (Sunstein, 2008). The Supreme Court did not agree. In essence, the right to own a firearm for a militia purpose and a collective right were both obliterated by the Supreme Court. The triumph of the individual rights interpretation after *District of Columbia v. Heller* and *McDonald v. City of Chicago* led to many individuals and gun rights interest groups challenging previous federal, state, and local firearm regulations that were accepted as constitutional before 2008 (Vernick et al., 2011). These laws were mostly struck down as an unconstitutional burden on individual rights. However, why did the Supreme Court decide now to make the individual right to self-defense the ruling precedent? If this truly was the precedent, why did the Supreme Court decline to overturn the individual right to own a gun for a military purpose, espoused in *United States v. Miller*, for over seventy years even when it had the chance to (Sunstein, 2008)? The answer is because the Justices are different and more inclined towards states' rights than they were in the past. However, they went against their own originalism when they decided to issue the ruling in *District of Columbia v. Heller*.

While both the historical evolution of the interpretations of the Second Amendment and how past Supreme Courts have ruled on it are important, there is even more to discuss about the application of the Second Amendment. The times have changed since 1776 and firearms have become more advanced and deadlier. Unfortunately, this means the issues surrounding firearms and the Second Amendment have also increased in complexity. This has created much misconception surrounding the modern issues and the Second Amendment. The final section of

this thesis will be dedicated to explaining these modern issues and if the Supreme Court will ultimately rule on them.

## **Current Issues**

### **Mental Illness**

The first of these modern Second Amendment issues is the relationship between mental health and firearms. For much of the modern history of the individual rights interpretation, the mentally-ill usually bear the brunt of the issues inherent to this dominant ideology. Unfortunately, this usually means the mentally-ill are used as a scapegoat to avoid the issues of violence that arise with firearms. This is due to a few high-profile mass murders perpetrated by mentally-ill individuals (Cramer, 2013). However, these cases are not representative of the mentally-ill population as a whole. In fact, the opposite is generally true. However, generalizations will not work when discussing mental illness. The type of mental illness and the degree of severity complicate any type of generalization, especially those about firearm violence (Ellis, 2017). Some of those affected by mental illness are only affected mildly, while others have more severe cases. Some of those affected by a specific mental illness have different symptoms from the rest of the population. Drug problems could also affect how violent someone with a mental illness could be (Ellis, 2017).

While those with mental illness are generally not violent towards other people, they do make up a significant portion of the prison population (Cramer, 2013). This is not conclusive proof that the mentally ill are violent and need their Second Amendment privileges revoked. In fact, many mentally ill prisoners are there for drug offenses and addiction. However, there are laws against owning a firearm if the purchaser is addicted to controlled substances. Again, there is a stigma about violence perpetrated by mentally-ill or addicts that does not necessarily align

with reality. For example, the Virginia Tech Massacre is often used to show how a mentally ill person can go on a rampage with a firearm. Seung-Hui Cho, a student of Virginia Tech, opened fire and killed thirty-two of his fellow students. Many of the professors and closest friends of Seung-Hui Cho described him as “not quite right” and “agitated” (Cramer, 2013). Furthermore, two years before the massacre, Seung-Hui Cho was arrested for stalking and reports of suicidal ideation. This led to a court-ordered health evaluation. However, Cho was released and his name was never put on the FBI’s background check list for a firearm (Cramer, 2013). Many individual rights proponents point to the mental illness of schizophrenia that affected Cho as the cause his murderous behavior. However, there were more complicated factors to consider that led to Cho’s decision to turn his firearm on his fellow classmates.

Generally, when mental illness and firearms are discussed in the same context, it usually concerns the subject of mass shootings. Mass shootings have undeniably become more prevalent in the media of the United States. However, mass shootings are not always indicative of mental illness. Furthermore, for all of their coverage, mass shootings do not happen that often (Knoll, 2016). Many of the mass shooting stories covered by the American media are not the typical scenarios for mass shootings. Instead, they are atypical, but the perpetrators have characteristics similar to other mass shooters. For instance, the perpetrators’ main motivation is usually anger and a desire for revenge (Knoll, 2016). These two feelings are not symptoms of mental illness, but of social factors. Most of these angry and resentful perpetrators were bullied and alienated by their peers (Knoll, 2016). While this does not excuse the horrible actions they took, it does explain how mental illness is not always the spark that creates violence. Furthermore, it is easier to blame mental illness as the cause of firearm violence instead of facing the fact that the perpetrator was once a victim, too. The evidence suggests that mental illness does not cause this

psychological break in mass shooters. In fact, perpetrators with a definable and specific mental illness only commit about three percent of violent crimes. (Knoll, 2016). Furthermore, mass shootings committed by those with a serious mental illness account for less than one percent of firearm homicides (Knoll, 2016). Even with these facts, mental illness has conflated with firearm violence.

The Second Amendment, according to the most recent Supreme Court decisions, protects an individual right to own a firearm for self-defense and other non-military purposes. Despite this, individual rights proponents have consistently advocated for restrictions on firearm ownership if the purchaser is mentally ill. However, the proponents assume that the mentally ill are dangerous to others, when this is not the case, arguing that Second Amendment rights should be restricted for the mentally ill for their own safety. Like all constitutional rights, the Second Amendment is not unlimited. While the mentally ill are not predisposed to violence against other people, suicide and self-harm are a different matter. Most firearm related deaths in the United States, on a yearly basis, are suicides (Knoll, 2016). This fact alone shows that the mentally ill usually turn the gun on themselves, instead of others. Instead of targeting the population as a whole, the gun restrictions need to be placed on the mentally ill considered high-risk for suicide (McGinty et. al, 2013). However, this is easier than done. As stated before, the relationship between mental illness and violence is deep and complex. Often, if a perpetrator has a mental illness and is violent, there is usually a substance abuse problem (McGinty et. al, 2013). In other words, there needs to be a better and more accurate way of defining Second Amendment rights when dealing those suffering from a serious mental illness, especially if there is a comorbid problem.

The current Supreme Court will most likely not take up another Second Amendment case soon, even if the case in question has unresolved questions about the relationship between mental illness and the Second Amendment. This is because *District of Columbia v. Heller* and *McDonald v. City of Chicago* were pretty clear in allowing for some reasonable gun restrictions. However, there is still no concrete framework to evaluate Second Amendment claims (Ellis, 2017). There needs to be a different form of scrutiny when dealing with the mentally ill and Second Amendment rights. The mentally ill should be considered a semi-protected group and the standard for Second Amendment claims should be intermediate scrutiny (Ellis, 2017). Intermediate scrutiny would be the middle ground and the “interest-based approach” that Justice Breyer wrote about in his dissent in *District of Columbia v. Heller*. In other words, those challenging a Second Amendment issue about the mentally ill must show that the restrictions further an important governmental interest. Under this standard, gun restrictions that intend to reduce suicide rates might be upheld. However, this standard must also be based on an approach that takes into account the inherent complexity of mental illness, violence, and other social factors (Hirschtritt et. al, 2018). This includes rejecting the generalization that the mentally ill are more predisposed to commit violent acts (Hirschtritt et. al, 2018).

Another key point for gun restrictions on the mentally ill is the laws should come from the state legislatures. This would help reinforce the intermediate standard. In fact, about 44 states and the District of Columbia already have some restrictions on gun rights for the mentally ill (Steverman, 2008). However, these laws are framed in the wrong way. These laws are primarily intended for public safety, not to reduce suicide rates. Furthermore, gun restrictions work best when there is a database that stores and tracks information on the effectiveness of the restrictions, which some of these 44 states do not have (Steverman, 2008). The state legislatures

could also focus on slightly tougher gun control laws, along with better mental health care, for those with suicidal intent (Smith & Spiegler, 2020). This two-pronged policy initiative would take into account the dangers firearms pose, while simultaneously striking down the myth of the violent mentally ill person. Furthermore, courts will have to rule on laws that are too restrictive and too lenient. While the intermediate scrutiny test is good, it will most likely be applied on a case-by-case basis. For example, the Sixth Circuit Court of Appeals had to rule on a case, called *Tyler v. Hillsdale County Sheriff's Department*, where the defendant had only one episode of involuntary hospitalization (Appelbaum, 2017). Under most federal and state law, a person has a lifetime ban from owning a gun if they were involuntarily hospitalized. However, most of the mentally ill who are hospitalized learn coping mechanisms and start treatment. The prognosis is usually good. *Tyler v. Hillsdale County Sheriff's Department* said that this lifetime ban must be on a spectrum and that the state legislatures must look at each case of mental illness separately to determine if they are well enough to own a firearm (Appelbaum, 2017). In other words, mental illness is complex and each case has the potential to be completely different. Mental illness cannot become a scapegoat for firearm violence and instead, the intermediate scrutiny or interest-based test must address the complexities inherent to the relationship between mental health and violence.

### **Personal Safety**

Another modern Second Amendment issue is the right to own a firearm for personal safety. While initially touched on in both *District of Columbia v. Heller* and *McDonald v. City of Chicago*, there are more in-depth issues that the Supreme Court left open. Much like the issue of mental health, the personal safety aspect of the Second Amendment is deep and complex. It becomes even more complex when sex and race are evaluated. When evaluating the meaning of



personal safety in terms of the Second Amendment, it is meant to encapsulate two ideas. The first is a right to self-defense. The second is the perceived threat level of a community or location. Fear is a powerful motivator and firearms are a source of comfort because they are seen as protective measures. However, there is also a distinct fear of guns among different populations. About 85 percent of the non-gun owning population feels less safe with a gun around, even if they were to own the firearm themselves (Hemenway et. al, 1995). However, this anomaly can be explained by gun-owners having a certain level of knowledge and familiarity with firearms that non-gun owners just do not have (Hemenway et. al, 1995). Still, the support for the right of self-defense is strong and was affirmed by both *District of Columbia v. Heller* and *McDonald v. City of Chicago*. However, the threat level perception of a community and its relationship with the personal safety and the Second Amendment has been less pervasive.

Perceived personal safety is often determined by the location of the person; however, different socializations and experiences can also help form beliefs about personal safety. For example, it is hypothesized that gun owners who were brought up with guns often feel that there are good, law-abiding people and bad, dangerous criminals (Hemenway et. al, 1995). This sentiment ignores the gray-areas of life that are present. Furthermore, they already assume that the “bad guys” already have firearms of their own (Hemenway et. al, 1995). This begs the question if guns are purely defensive instrumentalities or a mix of offensive and defensive ones. Many proponents of gun control feel that it is the latter. Firearms, while good for defense, can be used in a mass shooting, suicide, or even accidental shootings. While these events can certainly happen in the presence of firearms, they are a rarity. Only suicides happen with consistency. Furthermore, gun control activists also advocate for better information on firearms. Their logic is that, if the population is better informed about the dangers posed by firearms and the realities of

crime rates, then most of the population would not want to own a firearm (Hemenway et. al, 1995). Under this rationale, personal safety would be negligible because the information does not support the need for self-defense. However, personal safety might mean so much more than protection from criminals.

Many gun owners feel that personal safety is the primary reason for owning a gun. About half of all gun owners have firearms because they feel it is needed for protection (Barragan et. al, 2016). However, the subject is also a little more nuanced. For some, it is a combination of factors, such as a dragging economy, social isolation, and problems with the police and crime (Barragan et. al, 2016). Personal safety is subjective and all of these factors could disrupt personal safety in some way. The Second Amendment still covers the personal safety aspect pretty well since the main part of *District of Columbia v. Heller* was a focus on self-defense. However, this does not discount the need for better firearm information within the community.

Often overlooked, the context of personal safety within a shared community is an important part of the Second Amendment. If the Second Amendment only protects an individual right, what are the rights of the community in relation to guns and personal safety? There is nothing explicitly against a community owning firearms under the Second Amendment. However, fostering a connection with a community, building relationships, and avoiding certain places and the police are all better ways to maximize personal safety, instead of increasing the risk with firearms (Williams et. al, 1992). While this is mostly the case, there is still high demand for communities to be armed against potential threats. However, this demand varies depending on the community. For example, the veterans coming home from active combat roles might want to take a communal stance against criminality and use firearms as a deterrent. This might be a sign of something deeper. When military members come home, it is often hard to

readjust to civilian life. If a veteran feels fearful to come home without a firearm, it is often due to Post-Traumatic Stress Disorder (PTSD) and a marker for readjustment (Sadler et. al, 2020). It is also prevalent in the female military members due to the danger faced by women in American society. Military members are more likely to be gun owners and patrol their property frequently. Many of these women had trauma associated with their deployment. Furthermore, they face problems, such as domestic violence, which only strengthens the feelings of protection towards firearms (Sadler et. al, 2020). Firearms also account for most military suicides. Helping these soldiers readjust to life outside of combat is imperative for their personal safety and creating a better community.

Personal safety and the Second Amendment have a complex relationship. However, it is still pretty clear that the Supreme Court regards the right to self-defense under the Second Amendment as precedent. The right can be limited by the states, but there has not been a substantive law regarding personal safety and the Second Amendment. In the meantime, there is a way to maximize personal safety without firearms in “dangerous” areas. Changing the mindset from violence to one of caution and understanding goes a long way (Williams et. al, 1992). In fact, containing fearful behavior is the imperative. Fearful behavior or showing unfamiliarity can make one a target of violent people in dangerous areas (Williams et. al, 1992). However, firearms will always be around for protection and that is not going to change anytime soon.

## **Hunting**

One modern Second Amendment issue that is often neglected is hunting. While hunting has been around since the dawn of humanity, only recently have firearms played a role in the process. In England and the colonies, there were laws about big game hunting, which often required firearms. Up until the eventual downfall of the Stuart dynasty, these hunting and big

game laws were in full effect (Kopel, 1998). However, these laws became lax after the movement for American Independence and eventual self-government. While these laws that restricted some firearms to hunting were still on the books, there was hardly any enforcement. Furthermore, until very recently, most gun-owning Americans' primary reason for owning a firearm was for hunting and recreational sport (Blocher, 2015). It was an individual right to hunt for food or sport. However, *District of Columbia v. Heller* only covered an individual right to own a firearm for self-defense. While *District of Columbia v. Heller* did mention hunting a few times, the ruling was mostly about self-defense. Hunting does not fall under that category, but it would undeniably pass the constitutional test.

While hunting is an important part of the Second Amendment, it is not the primary reason for the inclusion of the Second Amendment in the Bill of Rights. The main reason was to protect the colonists from internal and external threats, such as a foreign or tyrannical government (Kopel, 1998). However, hunting is an important area to consider when making any laws that restrict gun rights. For example, the type of guns used for hunting does not need to be excessive. Shotguns are one type of these guns. A shotgun is extremely powerful and might be useful in some hunting situations but, for the vast majority of hunting situations, they are excessive. Furthermore, shotguns are less regulated than most firearms in the United States (Machine, 2017). A rifle would be more appropriate for hunting. However, shotguns are popular in shooting sports, so regulation could cause problems. Assault weapons, such as the AR-15, do not constitute hunting weapons, but still fall under the protection afforded by *District of Columbia v. Heller* (Blocher, 2015). These assault weapons, which will be discussed later in this section, should not be allowed for hunting purposes. They are dangerous, powerful weapons that can be easily mishandled. However, the Supreme Court would likely not consider this issue because

hunting is a core value of the Second Amendment and *District of Columbia v. Heller* makes the point moot (Blocher, 2015).

Hunting, while requiring a permit, is usually not otherwise regulated. While the actual text of the Second Amendment does not mention hunting, the values inherent to the Second Amendment apply to hunting. For example, continually using a firearm in hunting can further training for self-defense, a key part of the Second Amendment (Blocher, 2015). However, many individual rights proponents and gun rights activists feel that the Second Amendment was not really talking about hunting. They believe that the Second Amendment was meant for something less pedestrian than hunting. Individual rights proponents and gun rights activists believe that hunting is recreational and the Second Amendment applies to broad government overreach that can have a drastic, tyrannical effect on the citizens of the United States (Blocher, 2015). In other words, hunting was so commonplace, it was an afterthought. Furthermore, the belief that a standing army is a threat to sovereignty and the new nation was critical to the passage of the Second Amendment. The Framers intended to have a provision of the Constitution to protect the right of the people and the states to be armed so the federal government would not have a monopoly on deadly force (Moncure, 1991). Hunting rights were not a primary consideration.

### **Classes of Firearms**

While the Supreme Court is unlikely to take up a case about hunting, a case about a specific class of firearms is another matter. While the Supreme Court, in *District of Columbia v. Heller*, brought up the idea that an entire class of firearms cannot be prohibited, the Court did not elaborate on what class of firearms can be limited or if an entire class of firearms can be limited in some capacity. Furthermore, the effect of gun lobbying on the classification of firearms matters a great deal when it comes to policy and lawmaking. The National Rifle Association has

poured millions of dollars into gun lobbying. Many of these laws are firearm classification bills and bills that restrict certain classes of firearms, which are already on tenuous constitutional grounds. The campaign contributions of millions of dollars affect how the United States Congress votes on gun control measures, such as firearm classifications (Kahane, 1999). Furthermore, there are many misconceptions about how firearms are classified.

One of the main issues about legislation that seeks to put a certain firearm into a particular class is how that class is defined by law. One way to classify firearms would be through using the specific firing pin mechanism to define the class (Liong et. al, 2012). This has been tried before in the United States through the National Firearms Act of 1934. A specific class of guns were banned, which included sawed-off shotguns. This was class defined by the modification of the barrel of the gun. However, firearms, like the AR-15 and other assault weapons, are defined by how fast the firing pin and trigger move. Automatic fire is the highest rate of fire with holding the trigger and the lowest rate of fire is manual or burst. Furthermore, the fully automatic firearm makes a bigger impression with its firing pin (Liong et. al, 2012). This gives the class defining features.

Another way classify firearms is by the types of ammunition used. While the ammunition of firearms will be discussed later, it is important to know how much ammunition can affect the classification of weapons. Marks on cartridge casings and caliber both are good ways for a more specific classification (Liong et. al, 2012). These both create a classification in the firearm type, but one based on the power of the ammunition instead of the firing rate. The Second Amendment has not covered this specific classification method of firearms. This is one issue that needs to be addressed since many of the laws on firearm restrictions use one or both of these classifications.

Since the Supreme Court explicitly said that the Second Amendment can be limited, these issues of classification should be addressed in the near future.

### **Ammunition**

While ammunition is a way to classify firearms, there are also questions of whether it is constitutional, under the Second Amendment, to regulate ammunition itself. The Second Amendment cases, such *District of Columbia v. Heller* and *McDonald v. City of Chicago*, only apply specifically to owning a firearm. These decisions are silent on the regulation of ammunition and its relationship to owning a firearm. There have been proposals to limit some kinds of ammunition, especially if the caliber is recognized to be too dangerous to be legal. The .50 caliber bullet, usually used in high-power sniper rifles, was the target of such regulation (Krouse, 2007). Proposals that were intended to limit the sale of .50 caliber ammunition include the Fifty Caliber Sniper Weapons Regulation Act of 2005 and the .50 Caliber Sniper Rifle Reduction Act. Both of these proposals called for amending the National Firearms Act and the Gun Control Act of 1968 to include high-powered ammunition and sniper rifles (Krouse, 2007). However, both of the proposals failed in committee after *District of Columbia v. Heller*. Another type of .50 caliber ammunition that was supposed to be regulated was a .50 BMG round. Unlike sniper rifles, this .50 caliber round was primarily used in heavy machine guns (Krouse, 2007). The House of Representatives also failed to pass this amendment to the bill.

For all of its history, the United States has not fully banned lead ammunition. Many countries, such as Denmark and Canada, have tight restrictions on the use of lead ammunition (Avery & Watson, 2009). The United States only regulates lead ammunition in exceptional cases. However, it has been consistently shown that lead bullets have unintended consequences, such as toxicity. Lead bullets have been known to cause lead poisoning and adverse health

effects among wildlife and humans (Avery & Watson, 2009). Banning this type of ammunition, while dubious under the Second Amendment, could be considered an environmental challenge to the Second Amendment. However, the Supreme Court would be unlikely to take up the case as a true challenge to the fundamental right of the Second Amendment, even if the bullets are poisonous or overly powerful.

Another key aspect of ammunition is the capacity of the firearm magazine to hold huge amounts of ammunition. Frequently, fully automatic guns have large capacity magazines to shoot a huge number of bullets incredibly fast. In other words, large capacity magazines make a firearm deadlier. In fact, a fully automatic gun with a large capacity magazine can fire between thirty and one hundred bullets in rapid succession without reloading (Flexner, 2017). This is usually in the span of two or three seconds. While the Supreme Court has failed to decide on the issue of ammunition, the Fourth Circuit Court took it upon itself to issue a ruling on this Second Amendment issue. In *Kolbe v. Hogan*, the Fourth Circuit Court ruled that the Maryland Safety Act of 2003, which banned assault weapons and magazines over ten bullets, did not violate the Second Amendment (Flexner, 2017). This was a major breakthrough on the modern issue of large capacity magazines. Nine other states and the District of Columbia soon followed (Klarevas et. al, 2019). *Kolbe v. Hogan* was also decided on the basis of intermediate scrutiny, which vindicated the test and Justice Breyer. However, large capacity magazines still result in more people dead and wounded. Even though Maryland has outlawed these large capacity magazines, 21 percent of all handguns have more than ten bullets (Flexner, 2017). At least at the federal level, large capacity magazines are here to stay.

While ammunition and large capacity magazines are normal in the world of firearms, they can be dangerous if used by the wrong hands. Specifically, large capacity gives an



advantage to mass shooters who want to kill as many people as possible (Klarevas et. al, 2019). The more ammunition allowed in the gun, the more it can shoot. Furthermore, many of the civilians killed by automatic firearms that use large capacity magazines are hit multiple times, which almost always results in death. The less ammunition allowed in guns, the safer civilians in a mass shooting are. The lulls in firing a firearm to reload gives invaluable and life-saving time to take defensive measures (Klarevas et. al, 2019). However, the ammunition and large capacity magazines are only two ways to increase the lethal power of a firearm.

### **Gun Modifications**

Another modern Second Amendment issue that deals with the speed, fire rate, and deadly capabilities of firearms is modification. Gun modifications are extremely popular and fairly cheap. Several different parts of firearms can be modified to make it more deadly. The most famous is the bump stock. During an outside music festival in Las Vegas, a gunman opened fire with a modified AR-15 and killing fifty-eight of the attendees (Gilbert, 2018). The gunman's AR-15 had a bump stock, which transformed the semi-automatic weapon into a fully automatic one. The modified AR-15 had the capability to fire four hundred rounds per minute. In response, the ATF took some measures to limit access to bump stocks. However, many of these preliminary steps are legally dubious because they classify the bump stock as a machine gun, which has a very specific meaning under the National Firearm Act (Gilbert, 2018). Many firearm groups, despite the carnage in Las Vegas, were outraged by the banning of this gun modification. The Gun Owners of America initiated a lawsuit and is very likely to win because the bump stock does not truly fit the specific meaning of a machine gun (Gilbert, 2018). Under the National Firearm Act, a machine gun is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a

single function of the trigger” (Gilbert, 2018). The bump stock does not fit this definition because it creates a mechanism by which the trigger is continuously hit at a faster rate, but the trigger must be depressed automatically. Unfortunately, a high rate of fire, under current law, does not define a firearm as a machine gun (Gilbert, 2018).

Other gun modifications can produce the same effect, even if bump stocks are banned. Hellfire triggers and binary triggers both produce the same effect present in bump stock AR-15s; however, neither are regulated by law or executive action. Instead, they are cheap and easy to find. The best way to regulate these kinds of modifications is through direct legislation or an assault weapons ban. An assault weapons ban, like the one in 1994, would ban some semi-automatic and all fully automatic models of assault weapons, which include any modifications (Flexner, 2017). However, the initial ban in 1994 expired after ten years. Efforts have been made to renew or revise the law, but have met stiff resistance from individual rights proponents (Flexner, 2017). The Supreme Court is unlikely to take this issue up, unless the *Gun Owners of America* case reaches them.

### **Militia Groups**

A prevalent modern Second Amendment issue is the militarization of far-right militia groups in the United States. Paramilitary and militia groups have existed in the United States since its inception. However, the groups have become increasingly radicalized over gun rights and far right politics. For example, Timothy McVeigh blew up a federal building in Oklahoma based on radical anti-government sentiment (Baumgarten et. al, 1995). The Ruby Ridge incident and the Branch Davidians’ deaths at Waco also reflected huge waves of anti-government sentiment. The far-right felt that the government was infringing on their rights and they felt attacked. The growth of militia groups was meant to check government power in case of tyranny.

However, as many as eighteen of these far-militia groups are considered hate groups and led by violent extremists (Baumgarten et. al, 1995). While these militias have existed on the fringe of American politics, they have been gaining in strength and boldness.

While the initial vision of the militia intended by the Framers died out, the National Guard took its place (Uviller & Merkel, 2002). The National Guard, while not truly a militia force, can be armed. Furthermore, Congress has not funded an organized state militia since 1903 (Uviller & Merkel, 2002). The National Guard, under the Second Amendment, is constitutionally sound and could qualify as a state militia. However, far-right militias have sprung up to defend their Second Amendment rights from government interference anyway. Furthermore, laws against paramilitary activity actually increase members and the number of far-right militia groups (Haider-Merkel & O'Brien, 1997). These laws are still important because they prevent potential violence or escalation. Even most police officers support these laws because they afford flexibility in charging the members (Haider-Merkel & O'Brien, 1997). Unfortunately, there is a correlation between anti-militia laws and an increase in membership. The increasing radicalization of these far-right groups has also played a part as the political environment becomes more toxic. The radicalization could potentially lead to violence. There is a difference, however, in planned ideological violence, like a militia assault, and spontaneous ideological violence, such as the Oklahoma City bombing (Fahey & Simi, 2019). The radicalization of planned ideological violence perpetrators presents lower risk factors that most likely go undetected. The radicalization of spontaneous ideological violence perpetrators has more risk factors that usually do not evade detection because of their erratic nature (Fahey & Simi, 2019). It is extremely difficult to say definitively if there is a pathway to violence or if there are risk

factors, but the prevalence of far-right militias has increased the risk of violence significantly, especially if their members have been radicalized.

While the risk of violence is potentially high, the Supreme Court would likely not rule against any militia group unless they actively attack the United States. The members have a right, under all interpretations of the Second Amendment, to form and have a militia. While the National Guard serves this purpose today, there is no precedent for completely banning militia groups unless they actively use violence on the population (Uviller & Merkel, 2002). While groups, such as the Arizona Patriot, Aryan Nations, Liberty Lobby, and the Minutemen, have extremely radical and hateful beliefs, they are not banned under the Second Amendment or any of its interpretations (Baumgartner et. al, 1995). The radicalization and increasing numbers of these extreme militia groups will pose a problem for the federal government to solve, apart from consideration of the Second Amendment.

### **Background Checks**

A key modern Second Amendment issue is background check laws and the strength or effectiveness of the Brady Bill, which is the quintessential law on background checks. Background checks, especially with the rise of the internet, have become essential to gun purchases and job interviews. The Brady Bill, passed during the Clinton administration, created a five-day waiting period to allow for a “reasonable background check” of those purchasing a firearm (Aborn, 1994). However, since the Brady Bill, there has not been a law that truly strengthens background check laws. Furthermore, there are loopholes around the background check laws. For example, an individual can skip a federal background check by buying a firearm from a private seller (McGinty et. al, 2016). This loophole is still prominent and makes its appearance in gun shows, where the regulations are lax. Another loophole in the background is

lending or borrowing firearms, especially in cases of emergency. However, this loophole was closed by the Bloomberg laws (Kopel, 2016). These laws also do a bit more. They also stop minors from attempting to purchase a firearm and affects safe storage of firearms (Kopel, 2016). These two loopholes, even with the Bloomberg law, show that the Brady Bill has some weaknesses.

Background checks are not prohibited by the Second Amendment. In fact, Justice Scalia actually acknowledges background laws in *District of Columbia v. Heller* and argues that background laws are not only constitutional, but necessary. The Brady Bill is constitutional because it is a limit on the Second Amendment, not a total ban. Background checks are also needed because certain populations, such as felons, are not allowed to own a firearm. When purchasing a firearm, a form must be filled out prove that the purchaser is not one of these certain classes. The problem is there is no system to verify the claims made on the form definitively (Dole, 1993). While this has gotten easier with the internet, there are still some excluded categories that do not have databases online, such as drug users or the mentally ill. Instituting a universal background check system would stop those intent on violence and the members of excluded categories from accessing guns in the first place (McGinty et. al, 2016).

After the Sandy Hook elementary school shooting, there was an influx of background check laws introduced in the states. Unfortunately, many of these proposed laws had mixed results in passing state legislatures (McGinty et. al, 2016). This is mainly due to the messaging around these laws. Many of the messages opposing these laws framed it as an infringement on conservative values, which lessened the support among individual rights proponents and conservative lawmakers (McGinty et. al, 2016). The Second Amendment, as interpreted by the Supreme Court, does not prohibit background checks, especially since they do not ban all

categories of people from owning a particular class of firearm. The Brady Bill passing Congress was contentious at the time (Aborn, 1994). However, it was immensely popular with the public. Even modern background check laws, if passed, would be extremely popular with the American public (McGinty et. al, 2016). Unfortunately, it would take much for a divided Congress to pass background check laws, since many of the individual rights proponents view the laws as an infringement on their unlimited right to bear arms.

### **Police Militarization**

While background checks are extremely important, there is another modern Second Amendment issue that affects a non-excluded category. Police militarization and the increasing incidence of fatal police shootings are important Second Amendment issues that are extremely relevant. In fact, there has found to be “a positive association between increasing militarization and the frequency of the use of lethal force against suspects” (Lawson, 2019). Law enforcement officers are employees of the state and have a duty to arrest those that commit crimes within the state; however, there has been an increase in lethal outcomes versus arrests. Police officers often find themselves in extremely stressful situations in which they have immense power and discretion. The use of state-sanctioned violence gives the police officer the power in a criminal scenario and often there is no way to hold the officer accountable if they are wrong in their judgment (Lawson, 2019). Militarization can be enforced through police internal policies. Furthermore, militarization changes the mindset and allows for lethal violence to become more acceptable (Lawson, 2019).

The Second Amendment was ratified because the Framers believed that it was needed in case of a tyrannical government. While police officers are, in general, good people, the militarization of law enforcement stirs up a frightening image. The police argue, perhaps rightly,

that an increase in firearm availability has led to more deadly encounters (Sherman & Nagin, 2020). However, the militarization and acquisition of military-grade weapons by law enforcement also plays a part. Many of the police, including the Fraternal Order of Police, believe that right-to-carry laws must be revised because they can affect an officer's safety (Mustard, 2001). While this might be true, militarization plays a greater role. The steady militarization started in the early 2010s when troop drawdowns in Iraq and Afghanistan were implemented. Section 1033, a program that gives police surplus military hardware, was also implemented and allowed police to access to assault rifle, sniper rifles, and even modified tanks (Lindsay-Poland, 2016). This mainly went unnoticed until the Ferguson Black Lives Matter protests in Missouri. Protestors were met with these military weapons. Furthermore, the Pentagon allocated grants to police departments in excess of \$5 billion (Lindsay-Poland, 2016). Eventually, President Obama stepped in by banning some weapons allocated under Section 1033.

While banning some military weapons allowed under Section 1033, the action stymied police militarization only marginally. Police departments began to issue directives to limit the democratic processes and accountability within the department surrounding the acquisition of military weapons and vehicles (Lindsay-Poland, 2016). This lack of accountability obscures how the funds are distributed within a department, especially regarding military weapons (Lindsay-Poland, 2016). Furthermore, larger departments can circumvent many of the limits on Section 1033. For example, a larger department can use a smaller department as a proxy to obtain more military hardware and become militarized than would otherwise appear (Lawson, 2019).

Two other key factors in police militarization are the recruiting of military veterans and the location where the officers are stationed (Lindsay-Poland, 2016). The recruiting of military veterans for police departments, while not inherently bad, does raise some questions about the

mindset of the officer. Many of these veterans come home with unresolved trauma that can influence how they view confrontation (Lindsay-Poland, 2016). This can potentially lead to more violent confrontations between police and the public. Location also plays a huge role in the mindset of the officer. Often, police officers are placed in areas where they are unfamiliar. This can breed an us vs. them mentality in the officer and creates a feeling akin to a military occupation (Lindsay-Poland, 2016). Race also plays a huge role in fatal police shootings. In the case of fatal shootings, about 25 percent of those shot are black (Sherman & Nagin, 2020). This is a disproportionate number compared to the African-American population in the United States. In fact, it is about double their representation in the United States.

While police militarization is an issue, it is not covered by the Second Amendment. The Supreme Court has acknowledged the need for police officers to defend themselves. However, the Second Amendment does apply to individuals. If the police obtain deadlier weapons, offenders will escalate their weaponry as well. In other words, it creates a domino effect and continues the cycle of violence. Gun control laws are needed, but the police also have to be prepared to relinquish some power over deadly force. Gun control laws do decrease the rate of police fatalities and they need to be implemented (Mustard, 2001). However, there also needs to be a de-militarization of the police force.

## **Schools**

Another relevant and modern Second Amendment issue is that of school shootings and of schools hiring armed resource officers. While school shootings are rare events, they cause tremendous damage and trauma. Unfortunately, they are becoming more commonplace in American schools. There are a few commonalities between these school shootings. One of the most important is that killers commonly use multiple firearms, like in Columbine (Kleck, 2009). These



firearms are often obtained through private sellers, which gets around the need for a background check. After these traumatic events, however, Congress has made no new gun control laws. There has not even been a small revision to existing laws to close the private seller loophole. An attempt came after Columbine. The Gun Show Loophole Closing and Gun Law Enforcement Act of 2001 intended to close the loophole on all gun transfers and give more money towards law enforcement efforts to curb gun violence (Schildkraut & Hernandez, 2014). There was also an attempt to curb gun show sales by restricting sellers at gun shows. The proposed Gun Show Background Check Act attempted to make gun show seller register in a database and report any unlicensed purchasers (Schildkraut & Hernandez, 2014). None of these proposed laws passed due to individual rights proponents and the fight over individualism. Furthermore, the closing of the gun show loophole might not have prevented Columbine because, up until that point, guns used in school shootings were obtained mostly through theft (Kleck, 2009). The dominant acquisition method today, however, is gun shows.

Schools have had to adapt to the rise in school shootings. One way they have accomplished this is by hiring school resource officers to protect students. Generally, this will be a police officer dedicated to the school. They serve by being law enforcement officers, but also by having some educational aspects to their job (James & McCallion, 2013). Police around schools were normal, especially for traffic control and sports events. However, school resource officers have become full time officers dedicated to the school and protection of the students in response to school shootings (James & McCallion, 2013). Some have argued, however, that a school resource officer is not just a protector, but a form of control over student conduct. There is controversy that having a school resource officer criminalizes student behavior and increases student arrests based on this criminalization (Theriot, 2009). These arrests are sometimes for

minor infractions. For example, the most common arrests by a student resource officer was for disorderly conduct. These types of minor offenses came down to the officer's discretion, not the school's discretion. Some schools have seen a 122 percent increase in the rate of arrests due to these disorderly conduct charges (Theriot, 2009). However, school resources do act as a deterrent against violence in schools. School resource officer programs are successful parts of safety plans, but they are only part of the safety plan (James & McCallion, 2013). A school, if it wants protection for its students, needs a comprehensive safety plan that includes student resource officers.

Student resource officers and school shootings are key areas for the Second Amendment. Gun control might limit the school shootings, but so might school resource officers. Furthermore, student resource officers carry guns. Schools are usually considered gun-free zones, but the school resource officer has a gun to protect the students. These are very interesting and contentious issues that most likely will not be addressed by the current Supreme Court unless a constitutional right of the students is violated by a student resource officer. However, the Second Amendment would most likely not be part of that analysis or case.

While school resource officers are allowed to carry guns in schools, another modern Second Amendment issue is also arming teachers with firearms in case of school shootings. Many teachers, just like students, are targeted in school shootings. Their lives are also in danger. However, it would be a mistake to give firearms to teachers or even train them in the use of firearms. Having a firearm in the classroom potentially harmful to the physical and mental health of the students and teachers (Rogers, Lara Ovaes, Ogunleye, Tyman, Akkus, Patel & Fadlalla, 2018). Having a firearm in a classroom is potentially dangerous. There might be an increase in accidental shootings and deaths, even if the teachers are trained. Furthermore, it is difficult to ask

teachers to make the choice to shoot their own students, even if the student is shooting in the school. The individual rights proponents insist that it is perfectly constitutional for a teacher to have a firearm; but this is flawed, as the constitutional right must be weighed against public safety (Rogers et. al, 2018). Furthermore, there is no guarantee that arming teachers would prevent school shootings or other violent behavior. In fact, easier access to firearms or forms of protection that use firearms are not associated with lower levels of violence (Rajan & Branas, 2018). Schools are also considered gun-free zones and teachers are expected to abide by this.

While arming teachers is dangerous, it is also very costly. Teachers would need training akin to law enforcement to use their firearms properly (Rogers et. al, 2018). This kind of training is expensive and school budgets would not be able to handle the costs. However, this is not the main concern that individual rights proponents have. They feel arming teachers is necessary because law enforcement is too slow to respond to school shootings (Gauthier, 2017). It is true that, in Columbine, officers took three hours to respond to calls for help. However, the Virginia Tech Massacre saw a ten-minute response time, but there were still massive casualties (Gauthier, 2017). The Second Amendment would not necessarily prohibit arming teachers, but that does not mean it is a good idea. A school resource officer dedicated to the protection of the school is the best way to ensure the safety of students and teachers.

### **Concealed Carry**

Another modern Second Amendment issue that is highly contentious is that of concealed carry laws. Concealed carry laws allow for individuals to have guns on their persons in public, but they do not have to show them. Usually, if you have a firearm in public, it must be visible. However, thirty-three states have issued permits in accordance with concealed carry laws (Donohue, 2003). This number has probably increased in the aftermath of *District of Columbia v.*

*Heller*. This Second Amendment issue is especially contentious because of the optics of hiding a firearm. The rise of mass shootings has put the American public on edge and these laws do not help. There are two types of concealed carry laws. The first is a “shall issue” law. A “shall issue” law binds the police or whomever is checking the permit to issue the permit if the applicant meets the qualifications (Grossman & Lee, 2008). This limits the issuer of the license because the applicant only has to meet a set of criteria and there is no discretion involved. This means an applicant does not have to explain their reason for owning a firearm (Grossman & Lee, 2008). The second type of concealed carry laws are called “may issue” laws. These laws allow for the issuing authority to impose a requirement that the applicant explain their reasoning for purchasing a firearm and relies more on discretion (Grossman & Lee, 2008). While both of these laws are measures intended for gun control, only “may issue” are restrictive. However, most states use the “shall issue” laws to issue gun permits. Curiously, a Republican or Democratic state government does not correlate with a switch to less restrictive “shall issue” laws (Grossman & Lee, 2008).

Concealed carry laws, for individual rights proponents, are justified on the premise that firearms are meant to protect from violence. Before the 1990s, it was rare for states to issue concealed carry permits to trained citizens. When states did issue concealed carry laws, they usually went to veterans or retired police officers (Kopel, 1996). However, concealed carry laws are now on the books of the majority of states. Fear of being a victim of crime is the primary motivation for those seeking concealed carry permits (Thompson & Stidham, 2010). Furthermore, many believe that concealed carry laws are another measure against mass shootings. Individual rights proponents point to the fact that most gun owners are responsible citizens and will protect others if a criminal opens fire (Nedzel, 2014). While it is true that most

gun ownership is legal in the United States, it does not solve the root of the problem of mass shootings if a responsible citizen kills a perpetrator. Furthermore, concealed carry in schools poses a major risk. Some argue that guns in schools via concealed carry laws is the best way to prevent a school shooting. They either argue that concealed carry laws reduce crime because responsible citizens stop crimes or that crime is deterred by good guys with guns (Nedzel, 2014). However, this argument fails to consider that making guns harder to get might reduce the crime. If a concealed carry law were in place, many of those who want a firearm might not take the time to get it because of the extra effort and cost. This might be the true reason crime is reduced when concealed carry laws are put in place.

The Supreme Court might take up a case about concealed carry, especially if the distinction must be made between “shall issue” and “may issue” laws. Concealed carry laws are laws imposed by state governments. This does not conflict with the majority opinion in *District of Columbia v. Heller*; however, the Supreme Court, which has taken an individual rights stance on the Second Amendment, might be more hostile to “may issue” laws. There is, of course, a partisan effect on the “shall issue” versus “may issue”. While there is no partisan relationship between the switch to “shall issue” from “may issue”, there is a partisan relationship between support of “shall issue” versus “may issue” (Grossman & Lee, 2008). The states with “shall issue” laws often have a large number of registered Republicans. Furthermore, there are also a high number of National Rifle Association members in these states (Grossman & Lee, 2008). Unfortunately, the belief that “shall issue” laws reduce crime is not the reality. In fact, they often increase crime (Donohue, 2003). So, while there is a partisan split, the reality is that less restrictive concealed carry laws can actually be a detriment.

**ATF**

The Bureau of Alcohol, Tobacco, Firearms, and Explosives, or ATF, is another modern Second Amendment issue. The ATF has come under fire for many of its tactics during the seizing of illegal firearms. One of the most famous examples is the Waco Incident involving Branch Davidians. The ATF has the responsibility of tracking illegal firearms and confiscating them (Krantz, 2013). This can happen peacefully or by force. The ATF botched the Waco operation, which was over illegal firearms, resulting in horrible casualties for both the ATF and Branch Davidians. However, this did not result in any change of ATF tactics. The ATF also executed severely flawed tactics in Operation Fast and Furious. In this case, the ATF was trying to stop the sale of illegal firearms to Mexican cartels. The ATF relied on allowed guns into the hands of lower-level cartel members in order to apprehend the higher member of the cartel. This operation also failed. A gun fight ensued, resulting in the death of an ATF agent (Krantz, 2013).

The use of force by a federal agency is very important in regards to the Second Amendment. One of the ATF's main goals is to prevent illegal gun ownership. However, deadly force, like in the failed operations, is important to understand for law enforcement (US Government Accountability Office, 1996). The ATF, as a federal law enforcement agency, must convey to its officers the policy of deadly force. The ATF does this through constant training and quarterly seminars on deadly force. The Second Amendment is important in this context because deadly force is primarily done through a firearm. The ATF has the right to arm its officers, but the agency cannot infringe on the Second Amendment. Furthermore, it is hard to distinguish between an illegal gun and one bought through the private seller loophole. The main tactic used also raises some questions. When there is a high-risk or dangerous search warrant executed, the ATF will use dynamic entry to execute the warrant. A dynamic entry relies on surprise and the swiftness of the operation (US Government Accountability Office, 1996). Unfortunately, it can

go wrong very easily. While illegal guns are not under the purview of the Second Amendment, the ATF needs to change its tactics and re-examine its policy on deadly force.

### **Conclusion**

The Second Amendment is an important modern issue that has not been fully addressed by the Supreme Court. The Supreme Court has, generally, declined to take up any new Second Amendment cases. One reason for this might be because the issue has become an incredibly hot debate. Chief Justice Roberts is very aware of his legacy and wants to maintain the apolitical nature of the Supreme Court. Furthermore, the Supreme Court only has the energy to take on a certain number of cases (Hardaway, Gormley, & Taylor, 2002). Certiorari is only granted sparingly. The Supreme Court might feel this issue has become more of a political question or it has become moot due to the cases *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Regardless, many states still implement gun control laws under the powers given to them under *District of Columbia v. Heller*. They have been challenged and there is likely to be some clarification on the Second Amendment in the near future.

The Second Amendment, as stated before, was created for the purpose of having a check on a tyrannical government. It was intended to prevent federal government overreach. However, this might be an outdated concept. Some have argued that the Second Amendment has not been properly fleshed-out as a concept since the Supreme Court has not provided a judicial framework to evaluate the Second Amendment. Furthermore, the lower courts have a stronger framework. This framework, however, is not really one conferred on a fundamental right (Zick, 2018). This Second Amendment, while part of the Bill of Rights, it is not necessarily fundamental. The Second Amendment is usually seen as a symbol for individualism and political sovereignty (Weatherup, 1974). The lower courts have not seen it this way and generally allow for

regulations on firearms. It was only after *District of Columbia v. Heller* that the calculus changed. Regardless, there was a fear of a standing army and the Second Amendment was seen as protection against a standing army (Weatherup, 1974). A standing army has been established and it has not turned on the states. While the Second Amendment is still important, the notion that it prevents governmental overreach is outdated.

All of these issues and cases bring one central theme to light when considering the meaning of the Second Amendment. This central theme is that the Second Amendment has no set meaning. Interpretations are constantly evolving over the extent to which the Second Amendment affects American life and culture. The Supreme Court has acknowledged that the Second Amendment is important and complex, but it still fails to offer a consistent framework by which to judge the constitutionality of gun control laws. This must be addressed in a future case to stymie the toxic political atmosphere created by Second Amendment debates. A new framework would help legislatures and lower courts carve out specific laws that might benefit society, while keeping the Second Amendment intact. The Supreme Court, however, seems unlikely to take up new cases on the Second Amendment anytime soon. However, there will be a case that eventually challenges precedent and the Supreme Court will have to come up with that new framework to make the Second Amendment workable in a modern society.



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